Filed 11/29/16 P. v. West CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEWEY WEST, Defendant and Appellant.	B269338 (Los Angeles County Super. Ct. No. BA252814) **ORDER MODIFYING THE OPINION AND DENYING THE PETITION FOR REHEARING [Change in Judgment]**

THE COURT:

The opinion herein, filed on November 10, 2016, is modified as follows:

1. In the disposition, after "affirmed" add: "without prejudice to consideration of a subsequent petition that supplies evidence of defendant's eligibility."

There is a change in the judgment.

Appellant's petition for rehearing is denied.

RUBIN, Acting P. J. FLIER, J. GRIMES, J.

Filed 11/10/16 P. v. West CA2/8 (unmodified version)

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SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEWEY WEST, Defendant and Appellant.	B269338 (Los Angeles County Super. Ct. No. BA252814)

APPEAL from the order of the Superior Court of Los Angeles County. Jose I. Sandoval, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Dewey West is currently serving a 15-year 4-month sentence following a 2005 guilty plea to multiple felonies for both first degree burglary and grand theft. Defendant appeals the court's denial of his petition for resentencing pursuant to Penal Code section 1170.18 (hereafter section 1170.18).

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The reporter's transcript consists only of the hearings held in 2015 on defendant's petition. A separate transcript, containing an affidavit of the court reporter, indicates that the notes and "disk media" related to the original 2005 proceedings are no longer in existence and therefore no transcript could be provided. The clerk's transcript is also minimal, containing only defendant's petition and the related minute orders from 2015, as well as several minute orders from 2005 regarding the taking of defendant's plea and the abstract of judgment. Our summary of the facts is limited accordingly.

In February 2005, defendant pled guilty to three felony counts of first degree burglary (Pen. Code, § 459; counts 1, 2 and 13), and 10 felony counts of grand theft (§ 487; counts 32 through 41). In his brief, defendant states that the charges arose from a series of burglaries and thefts engaged in by defendant and an accomplice posing as real estate agents, attending open houses at various properties, and stealing items from those properties. As part of the plea agreement, counts 3 through 12 and counts 14 through 31 were dismissed. Defendant was sentenced to state prison for a term of 15 years 4 months.

On June 10, 2015, defendant filed, in propria persona, a petition pursuant to section 1170.18, subdivision (a). Defendant

argued his sentence should be recalled, and he should be resentenced for misdemeanor shoplifting, instead of grand theft, because the value of the stolen items was less than $950, the statutory minimum for felony theft. In the one-page unsworn attachment to his petition, defendant states that "several" of the 10 grand theft counts on which he pled guilty involved the theft of items valued at less than $950. Defendant does not identify which counts allegedly involved lesser amounts, and states only that the items "in question [are] 22" T.V., [a] link to a gold watch band, and a few hand guns nothing exotic." The record does not contain any other evidence or information in support of the petition.

The court continued the original hearing on the petition after it was discovered that, due to the age of the case, the court file could not be located. The hearing was rescheduled to allow the district attorney's office to locate its file and provide a response. At the continued hearing on November 13, 2015, the prosecutor argued against the petition, stating that a review of the district attorney's file indicated that all of the amounts in question exceeded $950. The court denied defendant's petition.

This appeal followed.

DISCUSSION

Section 1170.18 was enacted as part of the Safe Neighborhoods and Schools Act, adopted by California voters in November 2014 as Proposition 47 (Proposition 47). Proposition 47 reclassified certain drug- and theft-related offenses that were felonies or "wobblers" as misdemeanors, and provided a resentencing process for individuals who would have been entitled to lesser punishment if their offenses had been committed after its enactment. As relevant here, subdivision (a)

of section 1170.18 provides that "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ."

Numerous courts have held that the petitioner bears the initial burden of proof to establish eligibility for reclassification and resentencing under Proposition 47. (See, e.g., *People v. Johnson* (2016) 1 Cal.App.5th 953, 969-970; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 (*Perkins*); *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880; see also Couzens and Bigelow, Proposition 47—"The Safe Neighborhoods and School Act" (May 2016) p. 42.) We agree with the rationale of these authorities.

Defendant's petition contained essentially no information upon which to determine his eligibility for relief under section 1170.18, except for the unsworn statement that the items "in question [are] 22" T.V., [a] link to a gold watch band, and a few hand guns nothing exotic."

According to a March 17, 2005 minute order, monetary restitution was ordered as part of the plea agreement. Pursuant to a stipulation of the parties, 12 of the victims received monetary compensation, with the smallest amount specified as $1,215. The minute order further noted that the agreed-upon restitution was for "unrecovered loss." The reasonable inference is that the items taken from the other victims were recovered, and monetary compensation was thus not warranted. It does not, as defendant argues, demonstrate that the value of the items stolen from the

other victims necessarily was less than $950. The petition was properly denied.

Defendant moved this court to take judicial notice of his probation report and a two-page document from the trial court titled "List of Victims and Restitution Owed for Unrecovered Loss." We denied the motion without prejudice to defendant demonstrating that the probation report was before the trial court. Defendant has not established that the report was before the court at the time of its ruling on defendant's petition. In any event, nothing in the documents presented for judicial notice contains any additional relevant evidence, and the request is denied.

Defendant also requested leave to augment the record with corrected copies of the reporter's transcripts from the August 21 and November 13, 2015 hearings on his petition. We granted defendant's request. The corrected transcripts clarify that defendant was not present, nor represented by counsel, at either hearing. The August 21 hearing was merely a continuance to allow the district attorney's office to locate the file. Defendant's petition was denied at the November 13 hearing.

The fact defendant was not present or represented by counsel does not persuade us that the trial court's ruling was improper. Like the defendant in *Perkins*, defendant failed to present a petition that demonstrated his eligibility for resentencing. "In a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950. [Citation.] The defendant must attach

information or evidence necessary to enable the court to determine eligibility." (*Perkins*, *supra*, 244 Cal.App.4th at pp. 136-137.)

The language of the statute reasonably implies that "in the normal case the superior court will rule on the basis of the petition and any supporting documentation." (*Perkins*, *supra*, 244 Cal.App.4th at p. 137; see also Couzens and Bigelow, Proposition 47—"The Safe Neighborhoods and School Act" (May 2016) p. 38 ["The court will be able to summarily deny relief based on any petition that is facially deficient."].) Moreover, there is no right to appointed counsel at the eligibility phase of review. (Couzens and Bigelow, p. 73 ["it does not appear the defendant is entitled to counsel for the initial preparation of the petition or in connection with its initial screening"].) Defendant failed to meet his burden of proof and the trial court was well within its authority to summarily deny his petition for failing to make a prima facie showing he was entitled to relief.

DISPOSITION

The court's order of November 13, 2015, denying defendant's petition for resentencing pursuant to Penal Code section 1170.18 is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.